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No. 80-2117

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

LOCAL UNION NO. 84, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO,

Petitioner,

v.

UNITED STATES, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether on the record evidence in this case the Fifth Circuit, consistent with this court's decision in International Brotherhood of Teamsters v. United States, properly found a racially discriminatory purpose in the adoption, negotiation or maintenance of the seniority system requiring a determination that the seniority system is not bona fide within the meaning of § 703(h) of Title VII of the Civil Rights Act of 1964?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iii
SUPPLEMENTAL STATEMENT OF THE CASE	1
REASON FOR DENYING THE WRIT	5
ARGUMENT	6
THE DECISION OF THE COURT BELOW IS CONSISTENT WITH THE DECISION OF THIS COURT IN TEAMSTERS V. UNITED STATES	6
CONCLUSION	19

TABLE OF AUTHORITIES

Cases	Page
Acha v. Beame, 570 F.2d 57 (2d Cir. 1978).....	12
Chrapilwy v. Uniroyal, Inc., 15 EPD ¶ 7933 (N.D. Ind. 1977)	12
Griffin v. Copperweld Steel Co., 22 FEP Cases 1113 (N.D. Ohio 1979)	12
International Brotherhood of Teamsters v. United States, 426 U.S. 241 (1977)	passim
James v. Stockham Valve & Fittings, Co., 559 F.2d 310 (5th Cir. 1977) cert. denied 434 U.S. 1034 (1978)	11,13
Patterson v. American Tobacco Co., 634 F.2d 744 (4th Cir. 1980), cert. granted, ___ U.S.L.W. ___ (1981)	12
Personnel Administration of Massachusetts v. Feeney, 442 U.S. 256 (1979)	15
Poe v. Ullman, 367 U.S 497 (1961)	22
Sears v. Santa Fe Ry Co., 25 FEP Cases (10th Cir. 1981)	12

Page

Swint v. Pullman-Standard, 624 F.2d 525 (5th Cir. 1980) .. 19,20,21

Younger v. Glamorgan Pipe, 621 F.2d 96 (4th Cir. 1980) 12

Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252 (1977) 11,17

Washington v. Davis, 426 U.S 229 (1977) 10,11,15

Statute

Civil Rights Act of 1964, §703(h), 42 U.S.C. § 2000e-2(h) 2,4,9

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On Petition for a Writ of Certiorari to The United States Court of Appeals For The Fifth Circuit

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BRIEF IN OPPOSITION

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SUPPLEMENTAL STATEMENT OF THE CASE*/

The facts of this case - filed in 1968 and captioned since 1969 as United States

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*/ Petitioners' presentation of the facts necessitates this supplemental statement.

v. Georgia Power Co.-[1/] arise out of a history of entrenched racial segregation in all aspects of employment at the Georgia Power Company. App. 34a. After reviewing all of the facts, the Fifth Circuit concluded:

> Considering the totality of the circumstances surrounding the seniority system, as found by the district court after trial, we hold the seniority system was not bona fide within the meaning of section 703(h).

Petitioner has set forth its own version of four of the factors which it asserts represent the basis of the Fifth

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1/ Technically the United States may not be respondent here. Since 1969 this case has been called United States v. Georgia Power Co. when two earlier filed private class actions, Charles King, et al. v. Georgia Power Co., Civil Action No. 11723, and Willie Moreman v. Georgia Power Co., Civil Action No. 12185, were consolidated with a pattern and practice action brought by the United States, Civil Action No. 12355. Only the private plaintiffs, King, et al., and Moreman filed notices of appeal leading to the Fifth Circuit decision of which petitioners now seek review. App. 6a.

Circuit's decision. Br. 4. A more accurate statement of the Fifth Circuit's findings - supported in the 1971 district court findings - is as follows:

a. The seniority system in fact provided upward mobility for whites and precluded advancement for blacks, although, on its face, it purported to operate equally upon all employees. App. 12a.

b. The differences in advancement opportunity for blacks and whites were not attributable to the existence of separate bargaining units. App. 13a.

c. The seniority system, established during an era of entrenced racial segregation, "tracked and reinforced the purposefully segregated job classification scheme." App. 14a.

d. Prior to 1969, the job classifications and sections were so organized were that black jobs were isolated from functionally related white jobs, exacting "seniority suicide" as the price of advancement out of any black job. App. 14a.

Respondents submit that these findings fully justify the determination that the seniority system was not bona fide within the meaning of section 703(h) of Title VII. But these were not the only findings pertinent to the Fifth Circuit's decision. The Court also reiterated the 1971 district court findings concerning special education and testing requirements imposed in 1963, shortly after the company lifted its policy of barring blacks from transfer out of the four black job classifications. These new requirements, applied to black jobs only, were obviously intended to inhibit transfer to white lines of progression.[2/] App. 2a.

2/ Under these requirements, persons in any of the black jobs were required to pass a battery of tests and to possess a high school diploma. App. 2a. At that time, over 45% of the company's foremen, supervisors and chief division operators lacked a high school diploma. App. 51a.

Respondents note, too, the district court finding that although in April 1969, the black laborer classification became an entry level job to certain white lines of progression, thereafter whites were hired directly into higher level jobs, violating the seniority expectations of senior black laborers. App. 78a.

REASON FOR DENYING THE WRIT

Petitioner Local Union No. 84, International Brotherhood of Electrical Workers, AFL-CIO, has challenged the Fifth Circuit's ruling on seniority. However, (1) the facts of this case do not warrant presentation of the questions framed by petitioner; (2) there is no conflict among the circuits[3/]; and (3) there is no conflict

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3/ Indeed, the decision below applies analysis that has been widely followed in other circuits. See note 4, infra.

with decisions of this Court because the Fifth Circuit reached a proper result on the facts of this case, and decided no important or new issues of law, but rather merely applied this Court's analysis in International Brotherhood of Teamsters v. United States, 431 U.S. 324 (1977) to a different set of facts.

ARGUMENT

THE DECISION OF THE COURT BELOW IS CONSISTENT WITH THE DECISION OF THIS COURT IN TEAMSTERS

I.

Petitioner's complaint about the decision of the Fifth Circuit is less

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3/ Continued

The Fifth Circuit noted a conflict among the circuits on the issue of whether a change in decisional law alone is a sufficient basis for upsetting final injunctive orders, but its decision in this case does not depend on its resolution of the issue. In any event, petitioner does not seek review on that question.

with that court's view of the applicable law or its application, but rather with that court's application of the facts found by the district court in 1971.

The linchpin of the first branch of petitioner's argument is the following statement in the 1971 decision:

> While no showing of any conscious intent has been made, as part and parcel of the scheme of job seniority which has resulted in racial discrimination to certain black employees as discussed in Part I, supra, and permitted the educational qualifications discussed in Part II, supra, each union is a proper party to suit and relief is granted in this respect. App. 115a.

As is apparent on its face, that statement deals with the question of whether or not the union was a proper party to the lawsuit. The statement, which the district court a properly classified as a conclusion of law, appears in a section of the decision captioned "Complaints of General Discriminatory Patterns and Practices by the

Unions." App. 115. It is not a finding that the seniority system was or was not bona fide. The major findings that relate to the bona fides of the seniority systems appear, appropriately, in those sections of the district court's findings of fact captioned "Contract", "Current Contract" and "New Findings". See App. 76-78 and 83-84. The portion of the decision relating to the union's participation suggests that the district court regarded the company as the motivating force behind the racial structuring of the seniority system. It found that the union knew of the discriminatory seniority structure and acquiesed in its maintenance. App. 103-04a.

We note too that at the time the district court wrote the quoted conclusion,

it was harmless surplusage since the question of whether a showing of intent was required in order to declare a seniority system in violation of Title VII was not legally relevant. App. 11. If it was, and if the finding of no "conscious intent" by the unions referred to the seniority system, that finding would have been clearly erroneous, given the positive findings of fact that lead unmistakably to the ultimate finding that this seniority system is not bona fide. App. 15a.

Petitioners seek to shore up its view of the district court's conclusion quoted above with what it contends are "other findings that indicated the seniority system was neutral and legitimate." Pet. 10. Its first contention that the union itself was integrated and represented black workers is of virtually no relevance on the question of the bona fides of the seniority

system. The finding of fact on which it relies to claim it represented black workers "fully" refers only to the union's actions in processing grievances. App. 104a. Its second assertion that the lines of progression were rational, Br. 10, actually supports a finding that the seniority system was not bona fide. The finding of rationality refers to the lines of progression as reformed after April 29, 1969, when the formerly isolated black classification of laborers was attached to the white lines of progression to which those laborers jobs were functionally related. App. 76a-78a. Petitioner's third assertion is nothing more than a statement that the system is facially neutral. The mere fact that the system is facially neutral does not always lead to a conclusion that the system is bona fide. See, Washington v. Davis, 426 U.S 229 (1976);

Village of Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S. 252, 266 (1977). As both the district court and the Fifth Circuit found, this system operated in a grossly unequal manner. App. 105a, 12a. That fact is strong evidence - and sometimes conclusive evidence - that the system is non-bona fide. See, International Brotherhood of Teamsters v. United States, 426 U.S at 241; Washington v. Davis, 426 U.S. at 241-2; and Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S at 265-66.

II.

The second branch of petitioners' argument represents a barely perceivable shift of focus from the first. Here it contends that the four part test employed by the Fifth Circuit in James v. Stockham

Valves & Fittings Co., 559 F.2d 310 (5th Cir. 19770, conflicts with this Court's Teamsters dicision in that under the Fifth Circuit rule disparate impact is sufficient to prove discriminatory intent. Pet. 14. Respondents submit that petitioner has misconstrued the Fifth Circuit's application of Teamsters and there is no conflict between the Fifth Circuit's ruling and this Court's decision in Teamsters.[4/]

Initially, respondents note that this Court has held that under certain circum-

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4/ Nor is there any conflict among the circuits. The courts in other circuits that have considered the issue have followed the Fifth Circuit and used the same test or a similar one to determine whether seniority systems are bona fide. See, e.g., Sears v. Santa Fe Ry. Co., 25 FEP Cases 337, 341-343 (10th Cir. 1981); Patterson v. American Tobacco Co., 634 F.2d 744 (4th Cir. 1980), cert. granted ___ U.S. ___ (1981); Younger v. Glamorgan Pipe, 621 F.2d 96, 97 (4th Cir. 1980) (per curiam); Acha v. Beame, 570 F.2d 57, 64 (2d Cir. 1978); Griffin v. Copperweld Steel Co., 22 FEP Cases 1113, 1118 (N.D. Ohio 1979); Chrapilwy v. Uniroyal, Inc., 15 EDP ¶ 7933 (N.D. Ind. 1977).

stances, disparate effect alone may be sufficient to establish discriminatory intent. See, Teamsters, 431 U.S. at 339. In any event, it cannot be fairly said that in this case the Fifth Circuit's decision was bottomed on evidence of disparate impact alone.

The Fifth Circuit considered the totality of the circumstances surrounding the seniority system, but paid particular attention to the four factors this Court deemed significant in Teamsters.[5/] It concluded that the Georgia Power seniority system was not bona fide. The Fifth Circuit's treatment of the factors con-

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5/ Petitioners concede that the four factors listed by the Fifth Citcuit in James v. Stockham Valves and Fittings Co., 559 F.2d 310, 35 (5th Cir. 1977), cert. denied, 434 U.S 1034 (1978) and applied in this case were deemed significant in this Court's analysis of the seniority system in Teamsters.

sidered is discussed below.

As to the first factor, the Fifth Circuit held that, while the seniority system at issue appeared to operate equally, " ... its facial neutrality was but a mask for the gross inequality beneath". The system in fact provided upward mobility for whites and precluded advancement opportunity for blacks.[6/] App. 12a. This

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6/ Petitioners appear to concede that the seniority system had this effect, although it points to one job traditionally held by white workers, meter-readers, which was unconnected to a line of progression. Pet. 14. Of course, there were over 100 other traditionally white jobs that provided advancement opportunity. Gov't Ex. 2, 8, 16. None of the traditionally black jobs provided for advancement opportunities, even though the job containing the largest number of blacks, laborers, was functionally related to several white lines of progression. There is no indication that the meter-reader classification is functionally related to any other job.

Court has held repeatedly that a statute (or rule), otherwise neutral on its face, must not be so invidiously applied as to discriminate on the basis of race. see, Washington v. Davis, 426 U.S at 241. Objective evidence that the law (or practice) bears more heavily on one race than another is important evidence supportive of the inference of invidious discriminatory purpose. Ibid.

The second factor considered by the Fifth Circuit, whether the seniority units are in separate bargaining units, informs the question of whether the evident disparate impact of the practice can be traced to some positive non-race related cause. Thus, as this Court noted in Personnel Administrator of Massachusetts v. Feeney, 442 U.S 256 (1979):

> If the (adverse) impact of this statute (veterans' preference) could

> not be plausibly explained on a neutral ground, impact itself would signify that the real classification made by the law was in fact not neutral.

442 U.S at 275. Respondents suggest then that it was not, as petitioner argues, "irrational," Pet. 15, to attach significance to the fact that this seniority system encompasses only one bargaining unit. Indeed, petitioner appears to recognize that the structure of the bargaining unit may be significant here. They point to the finding that the seniority units are made up of "functionally related jobs," Pet. 15, but decline to confess that until April 29, 1969, the traditionally all black classification of laborer was isolated from the white job classifications with which it was functionally related. App. 78a.

As to the third facor, petitioner concedes that the seniority system had its

genesis in a period of overt racial discrimination, but suggests that the seniority system was untainted by the experiences of that era because it was "irrelevant to the segregationist employment patterns." Pet. 15. Respondents submit that petitioner is wrong on the facts and the law. The historical background against which the seniority system was estabished is an important source of evidence. See, Village of Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S at 267. Certainly, the fact that until July 29, 1963, Georgia Power pursued an "open and unvarying" policy that prevented blacks from competing for any but the most menial and low-paying jobs is significant. Ibid. More importantly, the objective evidence reveals that accommodations were made to the racial imperatives that governed at Georgia Power during that era, and

that the seniority system did not escape unscathed. The Fifth Circuit properly took note that until 1969, the formation of functionally related lines of progression yielded to the dominant social requirement of racial separation. App. 14a.

As to the fourth factor, that the seniority system was not maintained from of any discriminatory purpose, we note that the racial gerrymandering of the seniority system remained unaltered until 1969. App. 14a. Moreover, shortly after the company abandoned the policy of racial segregation in 1963, it imposed testing and formal education requirements, applicable to traditionally all-black jobs only, with the foreseeable consequence of severely limiting the number of blacks who could transfer to formerly white jobs. App. 2a.

Given these facts, a finding follows that the seniority system at issue here is

not entitled to the limited immunity accorded bona fide seniority systems by § 703(h) of Title VII. The Fifth Circuit was faithful to the teachings of this Court in Teamsters.

CONCLUSION

The 1971 findings of the district court as well as the record in this case demonstrate that the seniority system at issue here is not bona fide as that term has been defined in Teamsters. As noted above, the Fifth Circuit has faithfully applied the principles of Teamsters.

For the above described reasons, the union's petition should be denied.

Should this Court ~~be~~ [not decide] to deny the petition now, respondents respectfully suggest that this case and Pullman-Standard v. Swint, No. 80-1190, be con-

sidered together. We make this suggestion for two reasons:

First, the major findings of fact here are not in dispute, unlike Pullman-Standard in which the factual setting is unusual. In Pullman-Standard the district court made critical findings based in part on court-prepared statistical analyses which were not reproduced for consideration on review. As a result, the Fifth Circuit was required to conduct its own detailed review of the facts. Here, the parties and the Fifth Circuit both have relied on the 1971 district court findings.

Second, the outcome of Pullman-Standard is of little practical significance to the affected employees.[6/] The Pullman-

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6/ We do not suggest that Pullman-Standard is moot. The extent to which plaintiffs are entitled to recover backpay remains a live issue.

Standard plant in Birmingham has shut permanently. Its bargaining unti employees were terminated in January 1981.[7/] In contrast, the Georgia Power Company supplies electricity to homes and businesses in virtually all parts of Georgia, and the collective bargaining agreement at issue in this case affects several thousand incumbent empoloyees at locations throughout the state. Thus, here, unlike in Pullman-Standard, the seniority expectations of thousands of workers will be affected.

Consideration of this case along with Pullman-Standard would permit this Court to formulate a rule of law in the crucible of contested issues of practical importance,

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7/ See, Brief of Petitioner Steelworkers in No. 80-1193, p. 5 n.4 and Brief in Opposition (to petition for grant of Certiorari) in Nos. 80-1190, 80-1193, p. 10 n.22.

the historic process which has long been recognized as contributing to wise decisionmaking. See Poe v. Ullman, 367 U.S. 497, 505 (1961).

Respectfully submitted,

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